Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2010-007912-001 DT 01/03/2012

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
S. LaMarsh
Deputy

STATE OF ARIZONA

KIRSTEN VALENZUELA
HILARY L WEINBERG

v.

DARNELL REUNA JACKSON (001)

ALAN ISSA TAVASSOLI
ANDREW ANDERSON CLEMENCY

CAPITAL CASE MANAGER
VICTIM SERVICES DIV-CA-CCC

RULING

Following Oral Argument on December 13, 2011, the Court took under advisement the Defendant's Motion to Dismiss Notice of Intent to Seek the Death Penalty Based upon Lack of Probable Cause Hearing on Enmund/Tison Findings in Capital Case.

IT IS ORDERED denying the Motion.

The Defendant is charged, *inter alia*, with three counts of felony murder. He asserts that the State's Notice of Intent to Seek the Death Penalty should be dismissed regarding these three charges because the Grand Jury did not find probable cause to support the *Enmund-Tison* finding[1] and no Court rule provides a procedural right to a probable cause determination of this finding.

[1] A defendant cannot be sentenced to death for felony murder unless he personally killed, attempted to kill, or intended that lethal force be employed, *Enmund v. Florida*, 458 U.S. 782, 798 (1982), or was a major participant in the underlying felony and acted with reckless indifference to human life, *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987).

The Court finds that the Defendant's argument is based on the faulty premise that the *Enmund-Tison* finding is functionally the same as the finding regarding an aggravating circumstance. The Arizona Supreme Court rejected this contention in *State v. Ring (Ring III)*, 204 Ariz. 534, 65 P.3d 915 (2003). In *Ring III*, the Defendants argued that because in *Ring v. Arizona (Ring II)*, 536 U.S. 584 (2002), the United States Supreme Court held that the Sixth Amendment required that aggravating circumstances making a Defendant eligible for the death penalty must be found by a jury, so must the *Enmund-Tison* finding be made by a jury. The Arizona Supreme Court held that the two findings were conceptually and constitutionally distinct:

> The difference between aggravating circumstances as substantive elements of a greater offense and the *Enmund-Tison* findings as a restraint on capital sentencing dictates our decision that *Apprendi/Ring* does not require these findings to be made by the jury. *Id*. The Sixth Amendment assigns to the jury responsibility for determining whether all statutory criminal elements exist. Therefore, a defendant cannot receive a particular sentence unless a jury finds all the elements of the offense charged. *Id*. at 384, 106 S.Ct. at 696 (citing *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)). The *Enmund-Tison* findings, on the other hand, operate as a judicially crafted instrument used to measure proportionality between a Defendant's criminal culpability and the sentence imposed. These two rules of law are conceptually and constitutionally distinct. We hold that the Sixth Amendment does not require that a jury, rather than a judge, make *Enmund-Tison* findings.
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> *Ring III*, 204 Ariz. at 564-565 ¶101.

Because the *Enmund-Tison* finding is not the functional equivalent of an aggravating circumstance, the State is not required to provide notice pretrial of its intention to prove this finding; the Eighth Amendment requires it to do so before a Defendant adjudged guilty of felony murder can be eligible for the death penalty. Consequently, neither the United States Constitution nor the Arizona Constitution requires that a grand jury find probable cause regarding the *Enmund-Tison* finding. *See*, *McKaney v. Foreman*, 209 Ariz. 268, 273 ¶23, 100 P.3d 18 (2004(holding that aggravating factors essential to the imposition of a capital sentence need not be alleged in the charging document and supported by evidence of probable cause to satisfy constitutional due process).

The Defendant also claims that the denial of a pretrial challenge regarding the "legal sufficiency" of the *Enmund-Tison* facts violates due process. Due process requires that the Defendant be provided adequate notice of the charges against him. *McKaney*, 209 at ¶14. Concerning the charges of felony murder, the defendant has been provided with constitutionally

sufficient notice by the Grand Jury's indictment. Concerning the *Enmund-Tison* finding, the Defendant has been provided with constitutionally sufficient notice by the State's notice to him that it intends to seek the death penalty should he be convicted of these charges. The State has presumably complied with Rule 15.1 disclosure and the defendant has been apprised of its evidence. The Defendant's right to due process has not been violated.

A pretrial hearing to challenge the "legal sufficiency" of the *Enmund-Tison* facts is not required by the United States Constitution or the Arizona Constitution, statutes or rules.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Orders 2010-117 and 2011-10 to determine their mandatory participation in eFiling through AZTurboCourt.